



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: December 21, 2018

CBCA 5344

CAULDWELL WINGATE COMPANY, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Stephen B. Hurlbut, John M. Neary, and Daniel R. Miktus of Akerman LLP, Washington, DC, counsel for Appellant.

Richard O. Hughes, Elyssa Tanenbaum, and Alexander C. Vincent, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **DRUMMOND**, and **SULLIVAN**.

SULLIVAN, Board Judge.

On December 20, 2018, the parties submitted to the Board a joint motion for entry of a stipulated judgment. The parties requested that the Board enter judgment in the amount of \$9,850,000.00, with payment to be made through the judgment fund administered by the United States Department of the Treasury in accordance with 31 U.S.C. § 1304 (2012). The judgment amount is inclusive of interest under the Contract Disputes Act through the date of this order. 41 U.S.C. § 7109. The parties have agreed that they will not seek appeal of, reconsideration of, or relief from the Board's decision and that each party will be responsible for its costs, attorney fees, and expenses incurred in the litigation of this appeal.

Decision

The Board **GRANTS IN PART** the appeal. In accordance with the parties' joint motion, the Board awards appellant, Cauldwell Wingate Company, LLC, the stipulated judgment amount of \$9,850,000.00.

(b) (6)



MARIAN E. SULLIVAN
Board Judge

We concur:

(b) (6)



JERI KAYLENE SOMERS
Board Judge

(b) (6)



JEROME M. DRUMMOND
Board Judge



MEMORANDUM

TO: MS. WINNIE ENG

FROM: ELIZABETH GUZMAN

SUBJECT: TMCH- CHANGES TO REA & CERTIFIED CLAIM

DATE: 12/22/15

Enclosed please find the Changes to REA and Certified Claim dated December 18, 2015.

Sincerely,
Elizabeth Guzman



December 21, 2015

Ms. Winnie Eng
Contracting Officer
General Services Administration
Acquisition Management Division
26 Federal Plaza, Room 1639
New York, NY 10278

Document ID: 2700008- 001707

Re: Infrastructure Upgrade of the Thurgood Marshall U.S. Courthouse
40 Centre Street, New York, NY
Contract No.: GS-02P-05-DTC-0021(N)

Request for Contracting Officer's Final Decision (REA # 921 dated June 17, 2014, amended REA #921 dated June 26, 2015 and amended REA #921 dated September 15, 2015)- Certified Claim, Amendment to REA#921 Certified Claim dated September 15, 2015

Dear Ms. Eng:

On June 17, 2014, the Cauldwell Wingate Company submitted a Request for Equitable Adjustment No. 921 for a compensable extension of time of **671 calendar days** (October 31, 2011 – August 31, 2013) and an equitable adjustment for the costs of \$28,082,024. Cauldwell Wingate subsequently submitted an amendment on June 26, 2015 and a Certified Claim on September 15, 2015.

Pursuant to the Contract, including FAR 52.233-1, Disputes, Cauldwell Wingate hereby submits an amendment to REA #921 Certified Claim in the amount of \$26,378,763 due Cauldwell Wingate as an Equitable Adjustment of the subject Contract. The adjustments subsequent to the September 15, 2015 amendment incorporate further discussions with the GSA Inspector General Audit Division and other modifications. A memo outlining the changes from the September 15, 2015 claim is attached.

Pursuant to the Contract, including, but not limited to: FAR 52.211-13: Time Extensions, FAR 52.242-17: Government Delay of Work, FAR 52.243: Changes, FAR 52.443-71 Equitable Adjustments, FAR 52.242-14: Suspension of Work, FAR 52.249-14 Excusable Delays, FAR 52.233-1 Disputes, Cauldwell Wingate Company LLC (CWC) hereby notifies the Contracting Officer of the following request for a compensable extension of time of **671 calendar days** (October 31, 2011 through August 31, 2013). The extension beyond the March 29, 2013 GSA Substantial Completion notification to CWC was for work caused by GSA modifications issued past the Substantial Completion date. The costs of: unresolved REAs, disputed REAs, open PDLs and disputed unilateral modifications, for an equitable adjustment in the contract price of \$26,378,763 due to causes beyond the control and without the fault or negligence of CWC.

For the foregoing reasons, it is requested that the Contracting Officer, issue a final decision for REA 921 as amended in writing within 60 days, or advise CWC, within 60 days, of the time when a decision on a claim will be issued from which an appeal may be taken from the "Disputes" clause of the contract.

In the event that the Contracting Officer fails to take action within 60 days CWC must conclude that the Contracting Office intends to deny the claim and accordingly, it will appeal the failure or refusal to issue a final decision to the Civilian Board of Contract Appeals.

Accordingly pursuant to the Contract Disputes Act of 1978 including FAR 52.233-1, Disputes, the following Certification is executed by the undersigned who is the senior company official in charge at Cauldwell Wingate Company LLC in New York, NY the company under contract with GSA,

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which Cauldwell Wingate believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

Also, please note that we hereby are amending those Cauldwell Wingate personnel authorized to submit or receive official notifications regarding this contract to be as follows-

Steven F. Jureller- President & CEO
Chris Hargrove- Executive Vice President
Michael Klingher- Chief Operating Officer

Cauldwell Wingate Company LLC

Date: 12/21/15 By: Chris Hargrove

(b) (6)

Signature

Title (Officer): Executive Vice President

Attachment:

Request for Equitable Adjustment #921- Summary of REA and Supporting Schedules dated December 18, 2015

Cc: Steven F. Jureller- CWC
Michael Klingher- CWC
Brian Burns- GSA
Robert Collegio- GSA
Maureen Lennon- GSA
Mark Paull- GSA
Ken Chin- GSA
Joan Ryan- GSA





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Port Washington, NY 11050

516.883.5510 • Fax: 516.767.7438

Memorandum

To: GSA

Date: December 18, 2015

From: Kaitlin Dorsch, CPA, CFE

Re: Changes to REA & Certified Claim

The following changes were made from the REA and Certified Claim issued September 15, 2015:

Contractor/Sub	Revision	Schedule	Line Item
CWC	Add (b) (4) professional fees of \$129,450	Summary	Professional Fees
CWC	Backcharges added to the claim (reducing CWC Costs)	Summary	Backcharges
CWC	Remove missing invoice from (b) (4) Fees	Summary	Professional Fees
Navillus	Navillus CO's & Unprocessed work tickets revised	Schedule 4.6	All
Five Star	\$900 copy & paste error corrected	Schedule 4.1.1	Project Engineer – 1/1/13-3/29/13
Five Star/Chelsea	Removed O&P for additional 7 months.	Schedule 4.1.5	"General Conditions" removed
Miller Druck	Add the additional cost of pollution insurance for \$4,340.37	Schedule 4.5	Pollution Insurance 10/30/11-10/15/12

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SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS ("Agreement") is entered into as of the Effective Date (defined below), between the United States General Services Administration ("GSA") and Cauldwell Wingate Company, LLC ("CWC").

RECITALS

WHEREAS, on January 17, 2007, GSA awarded Contract No. GS-02P-05-DTC-0021 (the "Contract") for preconstruction services related to the Thurgood Marshall Courthouse in New York, New York (the "Project") with two options;

WHEREAS, GSA also contracted with Beyer Blinder Belle Architects and Planners, LLP ("BBB") for architect/engineer services related to the design of the Project and with Lend Lease (US) Construction LMB Inc. (formerly known as Bovis Lend Lease, LMB, Inc.) ("LL") for construction management services;

WHEREAS, on March 29, 2007, GSA exercised Option 1;

WHEREAS, on or about April 15, 2009, GSA and CWC entered into three modifications for an upgrade of the mechanical, electrical, plumbing, and sprinkler system infrastructure under the Project ("Construction Option 2" or "CO2");

WHEREAS, on April 30, 2009, GSA issued a notice-to-proceed to CWC to begin CO2 work, which initially prescribed a completion date of October 30, 2011;

WHEREAS, CWC contended that substantial completion was not achieved until August 31, 2013, resulting in a total potential delay period of 671 calendar days (the "Delay Period");

WHEREAS, CWC submitted a Request for Equitable Adjustment ("REA") on June 16, 2014, a revised REA on June 26, 2015, a certified claim on September 15, 2015, and a revised Certified Claim on December 22, 2015 (the "Claim") (collectively, the "REAs/Claims");

WHEREAS, in its Claim, CWC asserted that GSA delayed the Project by 671 days, partly as a result of design deficiencies, and sought \$26,378,763 in damages, plus interest, on behalf of itself and several subcontractors;

WHEREAS, on March 11, 2016, the Contracting Officer denied the Claim;

WHEREAS, CWC filed a notice of appeal with the Civilian Board of Contract Appeals, which is styled as Cauldwell Wingate Company, LLC v. General Services Administration, CBCA No. 5344 (the "Appeal");

WHEREAS, GSA and CWC (the "Parties") desire to settle on mutually satisfactory terms all matters relating to the Contract, the Project, the Delay Period, the REAs/Claims and the Appeal in order to avoid protracted and costly litigation and without either Party admitting fault, liability, misconduct, or wrongdoing of any kind in relation to those matters.

NOW THEREFORE, in consideration of the foregoing and of the mutual covenants, agreements and conditions set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Incorporation of Recitals.** The above recitals are true and correct and incorporated herein as a substantive part of this Agreement.

2. **Effective Date.** As used herein, the term "Effective Date" means the date on which all Parties have signed this Agreement.

3. **Payment to CWC.** In consideration of CWC's releases and promises described herein, GSA agrees to enter into a joint stipulated judgment with CWC in the total sum of NINE MILLION, EIGHT HUNDRED AND FIFTY THOUSAND DOLLARS (\$9,850,000.00) ("Judgment Amount") in accordance with the procedures described in this Agreement.

- a. Upon execution of this Agreement by all Parties, GSA and CWC agree to submit to the Civilian Board of Contract Appeals, in the form of Exhibit A hereto, a joint motion for entry of a stipulated judgment on the Appeal in the amount of \$9,850,000.
- b. GSA will promptly submit a request for payment of the Judgment Amount set forth in this paragraph to the United States Treasury Department's Bureau of Fiscal Service after receipt of all the following: Civilian Board of Contract Appeals' entry of judgment, CWC's electronic funds transfer information and taxpayer identification number (as required by FMS Form 197, Judgment Fund Voucher for Payment), and any other information needed to process payment of the Judgment Amount.

4. **Release by CWC.** Except for any rights, claims, and remedies under this Agreement, CWC, on behalf of itself and all of its Subcontractors, materialmen, and suppliers on the Project (the "CWC Parties"), hereby releases and forever discharges the United States and all of its agencies, agents, servants, employees, officials, successors and assigns (including GSA) from any and all claims, rights, demands, causes of action, and liability, whether present, future, known or unknown, that any of the CWC Parties have or may have relating in whole or in part to the Contract and the Project, including, without limitation, the Delay Period, the REAs/Claims, and the Appeal, any and all claims for fees or costs under the Equal Access to Justice Act, 5 U.S.C. § 504, and any and all claims for interest under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7107 *et seq.*, and/or the Prompt Payment Act (the "CWC Released Claims"). This Agreement serves as a bar to any and all causes of action, claims, rights, demands, or subrogated interests, known or unknown to the CWC Parties, which they have or may have against the United States arising under or related to the REAs/Claims or Appeal, as well as any other claims arising under the Contract, from the beginning of time until the Effective Date.

- a. The term "Subcontractors," as used in this Agreement, includes, but is not limited to, all of the subcontractors on the Project, whether included in the REAs/Claims and/or Appeal or otherwise, as well as their current and former parents, subsidiaries, affiliated and related entities, their successors

and assigns, and any current, former or future owners, shareholders, officers, directors, agents, representatives, employees, successors, and assigns of such Subcontractors.

- b. CWC, on behalf of itself and its Subcontractors, agrees not to initiate, directly or indirectly, any lawsuit, action, appeal, or claim against GSA with respect to the work performed or completed by CWC, or any of Subcontractors, or with respect to any of the CWC Released Claims. In the event that any Subcontractor or other third party brings or initiates any such claim, appeal, action or lawsuit against GSA in contravention of this provision, then CWC shall indemnify and hold GSA harmless from all such claims, appeals, actions, lawsuits, and damages, including attorneys' fees, arising out of or relating to the CWC Released Claims and shall, upon GSA's sole discretion, assume the defense of GSA with GSA having the right to control said defense and solely to determine whether to settle.

5. **Release by GSA.** Except for any rights, claims, and remedies under this Agreement, GSA hereby releases and forever discharges CWC, its officers, agents, attorneys and employees of and from any and all claims, rights, demands, causes of action, and liability, whether present, future, known, or unknown, that GSA has or may have relating in whole or in part to the Contract and the Project, including, without limitation, the Delay Period, the REAs/Claims, and the Appeal (the "GSA Released Claims"). This Agreement serves as a bar to any and all causes of action, claims, rights, demands, or subrogated interests, known or unknown to the Government, which it has or may have against CWC arising under or related to the REAs/Claims or Appeal, as well as any other claims arising under the Contract, from the beginning of time until the Effective Date. Notwithstanding the foregoing, the Parties expressly exempt from this release by GSA claims by the Government for latent defects under the Project that were unknown as of September 11, 2018. Nothing contained herein shall be construed as an acknowledgement by CWC that the Government is legally entitled to recover on any such claims for latent defects.

6. **Cooperation in Suit Against BBB.** CWC agrees to cooperate with GSA in pursuing claims against BBB for design deficiencies that are related to or arise from the Contract, the Project, the Delay Period, the REAs/Claims, the Appeal, and this Agreement (the "Design Deficiency Claims"). The Parties agree that such design deficiencies were a substantial factor in causing the delays at issue in the Claim and the Appeal.

- a. Cooperation shall consist of providing reasonable access to: all non-privileged documents in CWC's possession, custody, or control relating to the Contract, the Project, the Delay Period, the REAs/Claims, and the Appeal; provided, however, that such non-privileged documents were not previously produced in discovery during the Appeal.
- b. Upon request of GSA, and subject to concluding an agreement for compensation, cooperation shall further consist of CWC making its personnel reasonably available, and reasonably endeavoring to assist in making its Subcontractors' personnel available, to GSA for purposes of

consultation, meetings, mediation, depositions and/or trial. CWC shall neither object to nor obstruct any attempt by GSA to retain and/or contract with experts/consultants retained by CWC and/or its Subcontractors for purposes of the Appeal to substantiate, compile, or prove the Design Deficiency Claims.

7. **No Admission of Liability.** The Parties understand and agree that this Agreement is a compromise and settlement of disputed claims. Except to the extent expressed in paragraph 6, this Agreement is not intended to, and shall not, constitute or be construed as either an admission of liability or lack of merit on any claim made by any Party or an admission of fault or wrongdoing by any Party.

8. **Authority.** The Parties expressly represent and warrant that they have entered into this Settlement Agreement voluntarily, with proper authority, and without any reservation. The only consideration for this Agreement comprises exclusively the covenants, rights, and obligations expressly set forth within this Agreement, and no other or further inducements or representations, written or oral, have been exchanged in connection herewith. Each Party acknowledges that it has had adequate time to reflect upon and consider the terms of this Agreement, agrees that none of such terms is the result of fraud, duress, coercion, or undue influence on the part of any Party.

9. **Binding Nature.** This Agreement shall be binding upon the Parties and their respective agents, servants, employees, officials, sureties, successors and assigns. Notwithstanding the releases contained in this Agreement, the Parties have the right to enforce the terms of this Agreement.

10. **No Third Party Beneficiaries.** This Agreement is intended to confer rights and benefits solely upon the Parties and not upon any other person or entity, except as expressly provided herein. No person or entity other than the Parties has any legally enforceable rights under this Agreement. Any right of action for enforcement or breach of this Agreement is reserved for the Parties only.

11. **Entire Agreement.** This Agreement contains the entire understanding of the Parties with respect to the settlement of all claims and disputes arising under or relating to the Contract, the Project, the Delay Period, the REAs/Claims, and the Appeal. Except as set forth in this Agreement, no representations, warranties, or promises, written or oral with respect to such settlement, have been made or relied upon by the Parties. No modification, amendment, or waiver of any terms or conditions of this Agreement will be binding upon the Parties unless it is in writing and signed by a duly authorized officer or representative of the Parties. This Agreement has been prepared by the Parties jointly, and, accordingly, the rule of construction known as *contra proferentem* shall not apply to the interpretation of this Agreement.

12. **Cooperation.** The Parties agree to cooperate with each other in good faith in order to effectuate and carry out the purposes of this Agreement, and to execute and deliver any and all additional documents necessary or appropriate to implement the provisions of this Agreement and the transactions contemplated herein.

13. **No Waiver.** The waiver of any breach of any term, covenant or condition herein shall not be deemed to be a waiver of any other term, covenant or condition or of any claim for any subsequent breach of the same or any other term, covenant or condition contained herein.

14. **Severability.** If, after the Effective Date, any provision of this Agreement shall be deemed invalid or unenforceable, such provision shall be fully severable and shall not affect the validity or enforceability of any other provisions of this Agreement.

15. **Execution in Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto warrant that they have read all of the Agreement and fully understand everything contained herein. Each Party fully and freely assents to all terms of this Agreement.

**CAULDWELL WINGATE
COMPANY, LLC**

**UNITED STATES OF AMERICA
Acting by and through the
General Services Administration**

By: (b) (6)
Steven F. Jureller
President and CEO

By: (b) (6)
Winnie Eng
Senior Contracting Officer

Date: 12/20/18

Date: 12/20/2018

Approved by Legal Counsel:

Approved by Legal Counsel:

By: (b) (6)
Stephen B. Hurlbut
Counsel of Record for
Cauldwell Wingate Company, LLC

By: (b) (6)
Richard O. Hughes
Senior Assistant Regional Counsel

Date: 12/20/2018

Date: 12/20/2018

EXHIBIT A

**UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS**

CAULDWELL WINGATE COMPANY, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

CBCA No. 5344

JUDGE MARIAN E. SULLIVAN

JOINT MOTION FOR ENTRY OF STIPULATED JUDGMENT

Under the authority of the Rules of Procedure of the Civilian Board of Contract Appeals ("CBCA") Rule 25(b), Appellant, Cauldwell Wingate Company, LLC ("CWC"), and Respondent, the United States General Services Administration ("GSA"), jointly move the Board to enter a final stipulated judgment in favor of CWC, which stipulated judgment shall provide as follows:

1. In full and final resolution of all elements of CWC's certified claim that is the subject of this appeal, and in accordance with the Settlement Agreement signed by the parties, the parties stipulate to an award in favor of CWC in the amount of Nine Million Eight Hundred Fifty Thousand Dollars (\$9,850,000.00). This amount is inclusive of interest under the Contract Disputes Act through the date of the Board's order granting this motion and shall be paid to CWC from the Judgment Fund administered by the United States Department of the Treasury in accordance with CBCA Rule 31, 31 U.S.C. § 1304, and 31 C.F.R. § 256.

2. The parties stipulate that, upon entry of the requested final stipulated judgment, all disputes, claims, counterclaims, and issues that were or could have been litigated in CBCA No. 5344 will be fully and finally settled and resolved.

3. CWC and GSA certify that neither of them shall seek reconsideration of, seek relief from, or appeal the final stipulated judgment requested herein. All such rights of reconsideration, review, or appeal with respect to such judgment that either CWC or GSA may have under CBCA Rules 26, 27, 28, and 32 are hereby waived.

4. CWC hereby waives any rights it may have under CBCA Rule 30 or otherwise to seek an award of attorneys' fees and expenses.

5. The parties further state that they will file all papers that may be necessary to effectuate the entry of the final stipulated judgment requested herein.

Dated: December 20, 2018

Jointly and Respectfully Submitted,

Stephen B. Hurlbut, Esq.
Akerman LLP
750 9th Street, N.W.
Suite 750
Washington, DC 20001
Telephone: (202) 824-1742
E-mail: Steve.Hurlbut@akerman.com
Attorney for Appellant

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Senior Assistant Regional Counsel
U.S. General Services Administration
One World Trade Center, 55th Floor
New York, NY 10007
Telephone: (212) 264-3057
E-Mail: Richard.Hughes@gsa.gov
Attorney for Respondent

**UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS**

CAULDWELL WINGATE COMPANY, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

CBCA No. 5344

JUDGE MARIAN E. SULLIVAN

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1. In full and final resolution of all elements of CWC’s certified claim that is the subject of this appeal, and in accordance with the Settlement Agreement signed by the parties, the parties stipulate to an award in favor of CWC in the amount of Nine Million Eight Hundred Fifty Thousand Dollars (\$9,850,000.00). This amount is inclusive of interest under the Contract Disputes Act through the date of the Board’s order granting this motion and shall be paid to CWC from the Judgment Fund administered by the United States Department of the Treasury in accordance with CBCA Rule 31, 31 U.S.C. § 1304, and 31 C.F.R. § 256.

2. The parties stipulate that, upon entry of the requested final stipulated judgment, all disputes, claims, counterclaims, and issues that were or could have been litigated in CBCA No. 5344 will be fully and finally settled and resolved.

3. CWC and GSA certify that neither of them shall seek reconsideration of, seek relief from, or appeal the final stipulated judgment requested herein. All such rights of reconsideration, review, or appeal with respect to such judgment that either CWC or GSA may have under CBCA Rules 26, 27, 28, and 32 are hereby waived.

4. CWC hereby waives any rights it may have under CBCA Rule 30 or otherwise to seek an award of attorneys' fees and expenses.

5. The parties further state that they will file all papers that may be necessary to effectuate the entry of the final stipulated judgment requested herein.

Dated: December 20, 2018

Jointly and Respectfully Submitted,

(b) (6)

Stephen B. Hurlbut, Esq.
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Suite 750
Washington, DC 20001
Telephone: (202) 824-1742
E-mail: Steve.Hurlbut@akerman.com
Attorney for Appellant

(b) (6)

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U.S. General Services Administration
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Telephone: (212) 264-3057
E-Mail: Richard.Hughes@gsa.gov
Attorney for Respondent

Certificate of Service

A copy of the foregoing was sent via email, on this 20TH day of December, 2018 to
Attorneys for Respondent U.S. General Services Administration, as follows:

Richard O. Hughes
Senior Assistant Regional Counsel
General Services Administration
richard.hughes@gsa.gov

Elyssa B. Tanenbaum
Assistant General Counsel
General Services Administration
elyssa.tanenbaum@gsa.gov

Alexander C. Vincent
Assistant General Counsel
General Services Administration
alexander.vincent@gsa.gov

/s/ Stephen B. Hurlbut
Stephen B. Hurlbut

